In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-514

HARRY BRAININ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with others in the United States District Court for the Southern District of New York, petitioner was convicted of conspiracy to violate the federal securities and mail fraud laws (18 U.S.C. 371) and of substantive violations of the securities law (15 U.S.C. 77q(a), 77x, 78i(a)(2), 78ff(a)) in connection with a scheme to manipulate the price of the stock of the Hercules Galion Corporation. He was sentenced to three months' imprisonment. The

court of appeals affirmed in a lengthy opinion which sets forth the facts in detail (Pet. App. A 1a-36a).

Petitioner contends that there is a conflict between the circuits on what evidence is admissible to prove a defendant's participation in a conspiracy. Petitioner also alleges that the trial court committed reversible error by permitting the government to exercise eight instead of six peremptory challenges.[1] These contentions are answered in our memorandum in opposition to the certiorari petitions of two of petitioner's co-defendants, see *Projansky and Leavitt* v. *United States*, Nos. 72-135 and 72-272, and we rely on that memorandum, a copy of which has been furnished to petitioner. We have also furnished petitioner with a copy of our memorandum in opposition in *Geier* v. *United States*, No. 72-390, another companion case arising out of the same prosecution and presenting the same issues.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

OCTOBER 1972.

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[1] Petitioner's reliance on *Amsler* v. *United States*, 381 F.2d 37 (C.A. 9), and *United States* v. *Crowell*, 442 F.2d 346 (C.A. 5), is inapposite, since in both of these cases the defendants, who were being tried for capital crimes, were afforded less than the allotted number of peremptory challenges. Neither of these cases involved the proper number of peremptory challenges available to the government.

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